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AMENDMENTS OF PARTS 32, 36, 61, 64,
AND 69 OF THE COMMISSION'S RULES
TO ESTABLISH AND IMPLEMENT
REGULATORY PROCEDURES FOR VIDEO
DIALTONE SERVICE

CC DOCKET NO. 87-266

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RM-8221

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In the Matter of)	
TELEPHONE COMPANY-CABLE)	
TELEVISION Cross-Ownership Rules,)	CC Docket No. 87-266
Sections 63.54-63.58)	
)	
and)	
)	
Amendments of Parts 32, 36, 61, 64, and 69 of)	
the Commission's Rules to Establish and)	RM-8221
Implement Regulatory Procedures for Video)	
Dialtone Service)	

Comes now Southwestern Bell Corporation ("SBC") and requests the Federal Communications Commission ("FCC") to grant it leave to file one day out of time its *Reply Comments* in connection with the FCC's *Fourth Further Notice of Proposed Rulemaking* herein, a copy of which is attached hereto. In support whereof, SBC avers:

1. The reply comments in connection with the FCC's *Fourth Further Notice of Proposed Rulemaking* were due to be filed on April 11, 1995. Over 70 parties filed initial comments, most of which were more than 40 pages in length. A summary of the initial comments prepared for internal use at SBC totalled more than 20 pages.

2. Undersigned counsel, who is stationed in SBC's corporate headquarters in San Antonio, had prepared the final draft of SBC's *Reply Comments* for filing in the late afternoon of April 11. An illness had prevented counsel from finalizing the pleading before that day. SBC's Washington office had alerted the FCC's clerk that the filing would arrive shortly before closing. However, due to the operation of a

3. Grant of this one-day extension will not harm any party to this proceeding. Because the pleading at issue is a reply to initial comments, no additional responsive round is scheduled. Therefore, no party will be deprived of any time to prepare a reply to SBC's pleading. In anticipation of the FCC's grant of this motion, SBC has served all parties to the proceeding with a copy of its *Reply Comments*.

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SUMMARY

After reviewing all 70+ initial comments filed herein, SBC remains convinced that the FCC has erred, perilously and in violation of both constitutional and statutory directives, by suggesting that it may mix principles of Title II and Title VI regulation of LEC provision of video programming. Rather, as argued in the *Initial Comments of SBC*, the LEC retains the option of choosing either a Title II (video dialtone) or a Title VI (cable service) operation. The choice is that of the LEC, not the FCC, because it flows from the nature of the undertaking of the LEC, not any public policy the FCC wishes to pursue. From this verity two other conclusions flow. The services of a video dialtone programmer, even if it is a LEC or affiliated with one, must not be regulated as a cable operator. The video operations of a LEC (or its affiliate) which chooses the cable model cannot be regulated under Title II as a common carrier.

It follows from this simple syllogism that many of the Commission's suggestions in the *4th FNPRM* are not available and many others make little sense. A LEC or its affiliate MAY (not "should be permitted to," which implies some choice on the part of the regulator) provide programming over the LEC's VDT platform. The FCC may not and should condition the provision of video programming by LECs upon their offer of VDT. The FCC should not reject the VDT model completely but, rather, improve it so that both a common carrier and a private carriage version become viable alternatives.

No further "consumer safeguards" beyond those already in place for the provision of nonregulated and enhanced services by LECs are necessary in the context of

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Comes now Southwestern Bell Corporation ("SBC") and files its *Reply Comments* herein in response to the Federal Communications Commission's ("FCC" or "Commission") *Fourth Further Notice of Proposed Rulemaking* ("*4th FNPRM*"), released January 20, 1995 (as modified by Order released March 1, 1995, extending time for reply to April 11, 1995).

Nearly all comments filed agreed on one salient point: A telephone company ("LEC" or "telco") can no longer be restrained from offering video programming if it chooses to do so. Nonetheless, the comments vary from insisting that LECs can ONLY provide cable service and that the invalidation of 47 U.S.C. § 533(b)

a condition precedent to the offer of cable service.² While Viacom appears to argue that the *NARUC* decisions³ do permit the FCC to impose common carrier status where necessary, this clearly is false and a distortion of the holdings. Rather, as the Court of Appeals for the District of Columbia recently reiterated, common carrier status emerges from the nature of the company's undertaking.

Whether an entity in a given case is to be considered a common carrier or a private carrier turns on the particular practice under surveillance.... [The FCC] may not impose common carrier status or any given entity on the basis of the desired policy goal the Commission seeks to advance.⁴

Once a common carrier service is undertaken, many (perhaps unintended) consequences may follow. But if a company has not chosen to offer a public service and has not in fact taken steps to do so, *NARUC I* stands for the proposition that it cannot be forced to offer the service.

Media General would have the Commission believe that LEC provision of video programming over its own VDT network is not constitutionally protected. It reaches this clearly erroneous conclusion based on two mistaken premises. From this

²This condition precedent process may well constitute a prior restraint on constitutionally protected speech as well. See generally *Gannett Co. Inc. v. DePasquale*, 443 U.S. 368 (1979); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). However, the FCC need not reach this issue if it agrees that the injunctions against it compel the agency to permit the LECs to choose either VDT or cable service.

³*NARUC v. FCC*, 525 F.2d 630 (D.C. Cir. 1976) ("*NARUC I*"); *NARUC v. FCC*, 533 F.2d 601 (D.C. Cir. 1976) ("*NARUC II*").

⁴*SWBT v. FCC*, 19 F.3d 1475, 1481 ("Dark Fiber Case") (D.C. Cir. 1994). In the very case cited by Viacom, the Court expressed the same thought. *NARUC v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976 ("*NARUC I*")): [T]o be a common carrier one must hold oneself out indiscriminately to the clientele one is suited to serve...." (emphasis supplied).

C. The FCC Should Not Choose the Cable Model to the Exclusion of the VDT Model.

SBC has never been glowing in its support of VDT. Nonetheless, it is worth retaining if only to ensure that the Commission leaves no stone unturned in its desire to encourage broadband infrastructure development and facilities-based competition for cable service providers. If the FCC improves the current VDT rules, however, they may be worth retaining.

Many commenters disagree. Cox, for example, argues that the Commission cannot retain VDT because the underpinnings are gone and it must build a new record for the construct. SBC too urged the FCC to reconsider the foundation of VDT in this proceeding, but to guide its hand in resolving the sticky questions of statutory construction it raised. Certainly many of the elaborate "protection" against LEC incursion into the then-verboten territory of video programming are so much overkill now that LECs have won back the right to participate in that market. That does not mean (though other facts might) that there is no market for common carrier video capacity offerings. Many LECs appear to wish to try the model, as evidenced by the *Initial Comments* of OPASTCO and USTA. Denying them this right would seem inconsistent with the FCC's charge to make universally available advanced telecommunications nationwide, with its avowed desire to generate wired competition for cable operators and the tendency generally to satisfy customer demands with new services.

Several, including Cox, posit that inconsistent regulation requires a choice

among the models. This notion is equally unconvincing under these facts. Cox assumes without proof that it will not be permitted to offer VDT while continuing to operate as a cable system. On the contrary, SBC argued initially herein that these same Solomonic choices must be imposed in exactly the same way on cable companies. If SBC must offer a common carrier video service as the price of providing the private version, so must Cox. If the video transport portion of video service is severable so as to render lawful (in the face of 47 U.S.C. § 541(c), which forbids common carrier regulation of a cable service) a requirement to offer it as a condition precedent to offering cable service, the same rationale applies to the cable companies. SBC believes Cox should not be left out of the opportunity to experience whatever mixture of regulation the Commission ultimately applies to SBC's services.

Others, like NCTA, appear to argue that the FCC should require the cable model because inadequacies in common carrier regulation in the face of this "brand new" enhanced service. SBC contends that the Commission took great pains in developing over the course of the last ten years all the "safeguards" necessary to mix regulated, nonregulated, affiliated and enhanced services in one network, one corporate structure and numerous consumer protections.

Still others, notably the broadcast and public interest community and some portions of the local governments, maintain that the cable model should be the exclusive one because local franchising is an essential tool in protecting important public policy goals. This argument, too, ignores some key facts. Telephone companies, in virtually every state in the Union, are "franchised" by some state or local entity. This entity may

not be (indeed often is not) the same entity that franchises cable operators. But a state public utility commission, for example, hardly can be said to be oblivious to the concerns of localities regarding customer service, safety and the like. Additionally, telephone companies must apply to local authorities for permission to use the public rights of way and easements. The negotiations for these "rights to use" are quite complex. Finally, telephone companies pay sizable gross receipts and other types of local taxes or assessments for the privilege of using the public streets which are expressly designed (and conditionally authorized so as) to compensate the local entity for disruptions occasioned by that use. These fees often exceed the 5% statutory maximum which can be assessed upon cable operators for LECs.

SBC neither wishes to ignore the legitimate concerns of local governments nor to pay twice for a single incursion upon the public domain. Individual state legislative efforts which reexamine and harmonize the basis for these assessments and provide explicit guidelines for local requirements would be preferable to the extreme positions of Cox and NCTA.¹² *See Comments of Cox* at 11-13 (arguing erroneously that because the advanced services expected as a result of VDT have not arrived, it is a failure).

¹²SBC does not mean to imply that VDT is a viable option today. At least four changes must be made before VDT could approach becoming realistic: (A) Anchor tenancy must be permitted, at least for analog capacity, and LECs must be permitted to serve as an anchor tenant; (B) No limit should be placed on the amount of capacity any programmer (including a LEC) can utilize; (C) The FCC should streamline (or eliminate) the requirement for a § 214 application for VDT service; and (D) The Commission should impose no restrictions on joint marketing by the LEC of video and telephony nor any limits on its use of CPNI to do so.

III. IF A LEC CHOOSES TO OFFER VDT SERVICE, THE COMMON CARRIER VDT SERVICES (I.E., THE VIDEO TRANSPORT OFFERED INDIFFERENTLY TO ALL PURCHASERS) ARE NOT SUBJECT TO TITLE VI REGULATION.

Anticipating the flood of commenters that assume the First Amendment decisions moot the resolution of the local franchise issue in *NCTA v. FCC*, 33 F.3d 66, 72 (D.C. Cir. 1994) ("*NCTA*"), SBC took some pains to explain why LECs (or their affiliates) that provide video programming over their own VDT networks are not "cable operators" and why the systems they use are not "cable systems," in the statutory sense. We will not repeat that analysis here. Suffice it to say that SBC did not anticipate only one argument on this point. The Association Of America's Public Television Stations and Media General contend that control of the system video content and delivery becomes "unified" once a LEC provides programming over its VDT platform and therefore, the LEC (or the LEC and its affiliate collectively) constitute a "cable operator."¹³

BellSouth, however, did anticipate this notion. In its *Initial Comments*, BellSouth explained that unified control in the sense of a cable system simply is impossible in the VDT setting, because the LEC will never control ALL the capacity of the system, unlike a cable operator. *Comments* at pp. 29-30. This distinction not only makes sense of the statute's "bright line" between common carrier services and cable

¹³These commenters rely on the definition of "cable operator," which includes any group of people, including affiliates, which control the management of a cable system. 47 U.S.C. § 541(b). BellSouth's interpretation, however, short-circuits that argument by reasoning that *NCTA* would not treat the VDT network, even with programming, as a "cable system," because the facilities are "divided and diverse....." Cf. *Brief for Respondents, NCTA, supra* at 22.

B. MCI's Recommendation For Additional Cost And Price Safeguards Should Be Rejected.

MCI and NCTA argue that more specific protection should be imposed. They claim that the cost allocation and pricing rules are inadequate to handle this service addition. MCI contends that significant changes are required to Parts 32, 36, 61, and 69 rules to accommodate video dialtone and programming costs under the video dialtone common carriage arrangement. This contention is erroneous, however, because MCI mischaracterizes the rules. For example, MCI states, "The price cap rules do not prevent LECs from allocating 75 percent of loop investment used to jointly provision VDT and telephony to the intrastate jurisdiction..." (page 8). MCI obviously confuses Part 36 with Part 61. Nowhere in the price cap rules is reference made to the 25 percent interstate basic allocation ratio that is part of the separations rules.

The separation rules do assign 75 percent of the cost of the subscriber common line loop category to the intrastate jurisdiction (page 10). However, MCI fails to acknowledge that the channel used to provision VDT service fits the separations definition of a Wideband Channel, and will therefore be categorized to the Wideband Category rather than to Subscriber Common Loop. The VDT cost assigned to the Wideband category will be directly assigned to jurisdictions where appropriate and the remaining VDT costs will be split between the state and interstate jurisdictions based on an appropriate allocator.

MCI's assertion that Part 32 is not designed to be service-driven is indeed correct, but, contrary to their implication, video dialtone service does not and should not

D. No Further Restrictions on a LEC's Use of CPNI Nor on Its Joint Marketing of Video Services are Necessary or Appropriate.

NCTA and Viacom, respectively, suggest that LECs should not be permitted to sell video and telephony in the same customer contact and that the LEC's video operations should not be permitted access to the customer proprietary network information (CPNI) related to its telephone customers. Neither of these suggestions should be adopted. While the comments argue that the joint marketing of video and telephony provide an insurmountable competitive advantage to the LEC, they remain absolutely silent about the reverse. Cable companies today are not restrained from making such joint sales. Nor are they restrained from using the information they have collected about their cable customers' video usage to design and market telephony to those customers. This competitive inequity cannot and should not be tolerated by the FCC. But the solution is not to prevent either operation access to the other. Rather, the Commission should apply the current CPNI and joint marketing rules applicable to the enhanced services provided by telecommunications common carriers to both types of companies.

As SBC argued in its *Initial Comments*, any further restrictions on joint marketing and use of CPNI in the context of video services would be particularly incongruous. Not only has the Commission twice been successful in defending the efficacy of these rules (and the other portions of its enhanced services framework) on

